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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOWAN DEAN,

Plaintiff and Appellant,

v.

CITY OF FOUNTAIN VALLEY,

Defendant and Respondent.

G047693

(Super. Ct. No. 30-2010-00427852)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jamoa A. Moberly, Judge. Reversed.

Younger Law Firm and Robert J. Younger for Plaintiff and Appellant.

Kutak Rock, Edwin J. Richards, Antoinette P. Hewitt and Tiffany K.

Ackley for Defendant and Respondent.

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The court granted summary judgment against plaintiff Jowan Dean in favor of defendant City of Fountain Valley on his complaint for creation and maintenance of a dangerous condition in an intersection. Plaintiff appeals, contending defendant did not make a prima facie case for design immunity, and, in any event, he produced evidence raising a triable issue of fact whether the intersection was built according to design. He also asserts the court erred in sustaining defendant's objection to his expert's declaration based on lack of personal knowledge and even if the objection was proper, the court should have granted plaintiff's request for a continuance to supplement the declaration with facts showing such knowledge.

We conclude defendant did not meet its initial burden to show there is a complete design immunity defense and reverse.

FACTS AND PROCEDURAL HISTORY

In November 2009, while plaintiff was riding his bicycle northbound on Foster Street, crossing the intersection with Talbert Avenue, in the City of Fountain Valley, he was hit by a car. After the claim he filed against defendant was rejected, he sued defendant for negligence.

The complaint alleged in part "[t]he basis of liability includes, but is not limited to[,] improper sequence, improper length of lighting, improper warnings, improper signage, and the like." The gravamen of the claim was that the length of the yellow light on at Talbert Avenue and Foster Street was less than the legally mandated three seconds.

Defendant filed a motion for summary judgment, claiming it was entitled to judgment because it had design immunity pursuant to Government Code section 830.6.¹ In support of the motion it filed the declaration of Mark Lewis, a licensed civil engineer

¹ All further statutory references are to the Government Code unless otherwise stated.

and traffic engineer, who was employed by defendant as the Director of Public Works/City Engineer.

Lewis declared at the time the intersection was designed and built in 1968, its design was approved by a licensed civil engineer. In 2006 traffic lights were installed when the intersection was renovated. Lewis reviewed the then current design, confirming it was in accord with engineering and defendant's standards, and approved the plans for the new construction. As part of his approval, Lewis "confirmed that the lighting sequence, including the yellow light sequencing, conformed with the applicable standards in effect at that time."

Lewis further declared defendant had no knowledge the intersection had been "physical[ly] change[d]" from 2006 to the date of plaintiff's collision. In addition, between 2002 to June 2012 just over 28,000 cars per day passed through the intersection without any accident known to defendant based on a negligent design or lighting sequence.

Plaintiff filed the declaration of Harry J. Krueper, a civil traffic engineer and traffic expert in opposition to the motion. Krueper's company, Krueper Engineering and Associates (KE&A), conducted a study of the intersection.

As Krueper stated, KE&A performed two timing studies. On the first it determined "the average yellow traffic signal interval" while on Foster Street crossing Talbert Avenue was 2.79 seconds. If the signal had the same interval on the day of the accident, then the interval was shorter than both the state standard and what was safe. The second study found an average yellow-light clearance interval was 2.99 seconds, apparently due to an adjustment by defendant.

Defendant objected to a large portion of Krueper's declaration on several grounds, including lack of or improper foundation, relevance, lack of personal knowledge, speculation, and improper opinion. The lack of personal knowledge objection was based on several of Krueper's statements, such as "we performed a timing

study” and “[w]e found.” (Italics added.) At the hearing plaintiff’s counsel argued that if the court was inclined to sustain those objections he would like a continuance so he could remedy the pronoun problem.

After argument, the court took the matter under submission. Subsequently it granted the motion, finding defendant had established the defense of design immunity, and plaintiff had not offered evidence to defeat defendant’s immunity. As part of the ruling the court sustained all of defendant’s objections to Krueper’s declaration.

DISCUSSION

1. Summary Judgment Standards and Review

Code of Civil Procedure section 437c, subdivision (c) declares summary judgment “shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” A defendant may bring a motion on the ground there is a complete defense to the action. (Code Civ. Proc., § 437c, subd. (o).) Every element of the affirmative defense must be established. (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.) Only if a defendant meets that burden will the burden shift to the plaintiff to produce evidence showing a triable issue of material fact. (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144.) We review a summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.)

2. Design Immunity

“Section 835, subdivision (b) provides that a public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained, and the public entity had actual or constructive notice of the condition a sufficient time before the injury to have taken preventive measures. [Citation.]” (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 68, fn. omitted.) Section 830.6 provides a defense

to liability based on design immunity. This was the basis of defendant's motion for summary judgment.

To prevail on that defense defendant had to establish: "(1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design. [Citations.]" (*Cornette v. Department of Transportation, supra*, 26 Cal.4th at p. 69.)

A review of the record shows defendant did not meet its burden to make a prima facie case for design immunity. Lewis's declaration states the plans to install the lights "conformed with applicable engineering standards and the standards set by [defendant]." Nothing in the declaration states those standards conformed to the three-second minimum time interval required for yellow lights by the Department of Transportation, as set forth in Krueper's declaration.

Defendant's separate statement stated Lewis confirmed the yellow light time interval "conformed with the applicable standards in effect at that time." Plaintiff did not dispute this statement. This is broader than the language used in Lewis's declaration and could be interpreted to encompass the Department of Transportation minimum requirement.² And the trial court ruled there was "no evidence that the design plans for the intersection called for a yellow light interval of less than 3.0 seconds"

But even assuming the plans called for a three-second yellow light interval, defendant failed to present any evidence the lights were actually installed according to that plan. In other words, defendant did not present any evidence the yellow light intervals were in fact at least three seconds in duration. (See *Wyckoff v. State of California* (2001) 90 Cal.App.4th 45, 52.) Without a showing the lights as installed had a

² In apparent contradiction, plaintiff did dispute defendant's statement that when approving the plans for installation, Lewis verified they conformed to "applicable engineering standards and the standards set by [defendant]."

yellow three-second interval, defendant did not satisfy the first element of design immunity, a causal connection between the design and the accident. The mere fact the plans for the design of the intersection may have included a yellow three-second interval is not sufficient to show the causal connection as defendant asserts. Because defendant failed to show a complete design immunity defense to the action, it cannot prevail on summary judgment.

Having resolved this issue in favor of plaintiff we need not reach his further content the trial court erred in sustaining defendant's objection to the declaration of plaintiff's expert.

DISPOSTION

The judgment is reversed. Plaintiff is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.